Supreme Court, U.S.
FILED

No. 981737 APR 29 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

In Re JOHN J. PAPPAS,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is it a violation of the First and Fifth Amendments to the United States Constitution for a federal district court to impose a public reprimand and monetary fine constituting a criminal contempt sanction against an attorney because of what he thought, as opposed to what he did, while circumventing the procedural safeguards provided by Federal Rule of Criminal Procedure 42?

PARTIES TO THE PROCEEDING

Jean Blain, Yelva Blain, and Liberty Mutual Fire Insurance Company are the parties in the underlying proceeding. The parent companies and nonwholly owned subsidiaries of Liberty Mutual Fire Insurance Company are as follows: Liberty All-Star Equity Fund, Liberty Asset Management Company, and Liberty Financial Companies, Inc. The issue before this Court, however, involves the following parties: John J. Pappas, attorney for Liberty Mutual Fire Insurance Company in the underlying proceeding, United States District Court Magistrate Judge David Baker, and United States District Court Judge Anne Conway.

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Petitioner, Mr. John J. Pappas, respectfully requests that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Orders referred to in this Petition for Writ of Certiorari are listed below. The Orders have not been published.

1. *Blain v. Liberty Mutual Fire Insurance Company*, No. 96-227 (M.D. Fla. July 10, 1996) (App. E).

2. *Blain v. Liberty Mutual Fire Insurance Company*, No. 96-227 (M.D. Fla. July 12, 1996) (App. D).

3. *Blain v. Liberty Mutual Fire Insurance Company*, No. 96-227 (M.D. Fla. August 8, 1996) (App. C).

4. *Blain v. Liberty Mutual Fire Insurance Company*, No. 96-227 (M.D. Fla. August 23, 1996) (App. B).

5. *Blain v. Liberty Mutual Fire Insurance Company*, Appeal No. 96-3680 (11th Cir. 1999) (App. A).

STATEMENT OF JURISDICTION

Mr. Pappas is seeking review of the February 1, 1999 Order entered by the Eleventh Circuit Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

The Fifth Amendment to the United States Constitution provides in relevant part as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 401 (1997) states as follows:

> Section 401. Power of Court.
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as — 1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; 2) misbehavior of any of its officers and their official transactions; 3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rule of Civil Procedure 11 states in relevant part as follows:

> (b) **Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> (1) it is not presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegation and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary

support after a reasonable opportunity for further investigation of discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Federal Rule of Criminal Procedure 42 provides:

(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt

> charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Local Rule 3.10(c)(2)(B) of the United States District Court for the Middle District of Florida states in relevant part as follows: ". . . a party may not seek discovery from any source before the [Case Management] meeting."

Local Rule 8.03 of the United States District Court for the Middle District of Florida states in relevant part as follows:

> It is contemplated by the court that the presentation of testimony shall be kept at a minimum, and that cases shall be presented to the arbitrators primarily through the statements and arguments of counsel.

STATEMENT OF THE CASE

A. Basis of Federal Court Jurisdiction.

Federal Court jurisdiction was invoked pursuant to 28 U.S.C. § 1332 because the case involves a dispute between citizens of different states and the amount in controversy exceeded $75,000 at the time Mr. and Mrs. Blain filed their Complaint against Liberty Mutual Fire Insurance Company ("Liberty Mutual") in the underlying proceeding.

The jurisdiction of the Eleventh Circuit Court of Appeals was based on the Collateral Order Doctrine. *Ortho Pharmaceutical Corp. v. Sona Distributors*, 847 F.2d 1512, 1515 (11th Cir. 1988).

B. Facts.

On January 30, 1996, Jean and Yelva Blain filed suit against Liberty Mutual in Florida State Court. Liberty Mutual removed the case to the United States District Court for the Middle District of Florida on March 1. On April 4 the District Court referred the case to the Court Annexed Arbitration Program, and ordered that each party

provide responses to "Standard Arbitration Interrogatories" prior to the arbitration hearing, which was set for June 25th.

Pursuant to Middle District of Florida Local Rule 3.05, the parties held their Case Management Meeting on April 12, 1996. Liberty Mutual had been prohibited from conducting discovery prior to this date by Middle District of Florida Local Rule 3.05, which states that ". . . a party may not seek discovery from any source before the [Case Management] meeting." M.D. Fla. L.R. 3.05. In accordance with the Case Management Report, on May 5 Liberty Mutual served its Initial Disclosures of Core Information upon Mr. and Mrs. Blain. Liberty Mutual's Disclosures contained a list of individuals possessing discoverable information, and a list of the documents it considered relevant to the disputed facts. The Blains failed to reciprocate before the arbitration hearing. *After* the arbitration had occurred, Liberty Mutual was forced to file its Motion to Compel Production of Plaintiffs' Pre-Discovery Disclosures and for Sanctions and Memorandum of Law in Support ("Motion to Compel") due to the Blains' failure to provide their Initial Disclosures naming individuals possessing discoverable knowledge, and identifying relevant documents.

Liberty Mutual filed its Responses to Arbitration Interrogatories prior to the arbitration hearing. (App. H at 23a). In response to Standard Arbitration Interrogatory Number Two requiring Liberty Mutual to "furnish a detailed basis for [its] defenses," Liberty Mutual stated as follows:

> Both fires were incendiary in origin. Evidence of irregular floor level burning was readily apparent, indicating the presence of a liquid accelerant. At least one of the Plaintiffs had the opportunity to set both fires. Both Plaintiffs had motive to set both of the fires. The residence was secured prior to the time of both fires. Only the Plaintiffs and their families possessed keys to the residence. There was no evidence of forced entry. No witnesses have identified any other individuals who had a motive to set the fires at or near the fire scenes during or shortly before the time of

the fires. At least one of the Plaintiffs has misrepresented/ concealed their whereabouts at the time of both fires.

On March 15, 1995, Mrs. Blain stated that on the date of the first fire, she had gone into work to file paperwork for her assignments the previous day. However, Mrs. Blain had not completed any assignments on the previous day, or during the entire month of March prior to the first fire.

Also, Mrs. Blain stated she left work to shop at several stores. She said she returned a $89 watch to Costco and that she received a refund. Costco had no record of anyone returning a watch that day or even having Mrs. Blain as a member.

Mrs. Blain stated that on the day of the second fire, she went to see her friend, Vivi Dorsainvil, who runs a hair salon. Mrs. Blain stated that she spent several hours with Ms. Dorsainvil. However, Ms. Dorsainvil stated that visit was relatively brief, maybe lasting a few minutes.

On August 30, 1995, Mr. Blain stated that on the day of the second fire, Mrs. Blain had been at a buffet with the children and that the rest of the day she was at work. However, Mrs. Blain had previously stated that she visited Ms. Dorsainvil that day.

With regard to motive, Liberty Mutual asserts that there are several motives for the fires. Mr. and Mrs. Blain's financial condition was one factor. That is, their poor credit history, loan history, and current financial status provides motive for the fires.

In addition to the aforementioned financial motive, there was another motive. Mrs. Blain and her children lived in the insured premises in Kissimmee, while Mr. Blain lived in a South Florida apartment. Mr. and Mrs. Blain were

> becoming increasingly disgruntled with this situation. This provided motive for the fires.

(App. H at 24a).

The Arbitration Hearing was held on June 25, 1996, approximately three weeks *before* the Blains provided to Liberty Mutual the names of individuals possessing discoverable information, and a list of documents containing relevant information. The Arbitration Hearing resulted in an Arbitration Award in favor of the Blains.[1] (App. G at 21a). Additionally, the Arbitration Panel issued a Report and Recommendations stating that the "Defendant . . . failed to present *any* evidence upon which the panel could find for the Defendant. . . . [a]ccordingly, the panel recommends that the Judge consider appropriate sanctions." (Emphasis supplied). (App. F at 19a).

In response to the Arbitration Panel's recommendation that sanctions be imposed, Liberty Mutual filed its Motion to Strike, and Objection to, Arbitrators' Recommendation of Sanctions ("Motion to Strike"). Liberty Mutual emphasized that it had proffered specific evidence at the Arbitration Hearing in support of its defenses, which had already been stated in detail in its answer to Standard Arbitration Interrogatory Number Two. Furthermore, Liberty Mutual pointed out that Middle District of Florida Local Rule 8.03 states as follows:

> It is contemplated by the court that the presentation of testimony shall be kept at a minimum, and that cases shall be presented to the arbitrators primarily through the statements and arguments of counsel.

M.D. Fla. L.R. 8.03.

On July 10, 1996, the Honorable District Court Judge Conway entered an Order denying Liberty Mutual's Motion to Strike. (App. E at 16a). The Court stated that it had taken notice of "Defendant's potentially sanctionable conduct arising from the arbitration hearing." (App. E at 17a). However, the Court asserted that it would not "rely

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1. The Arbitration Hearing was not recorded (there was no court reporter).

on the arbitration panel's recommendation as a factual finding," and would refer to Magistrate Judge Baker the issue of "whether sanctions should be awarded for Defendant's inadequate preparation and presentation at the arbitration hearing." (App. E at 17a).

On July 12, 1996, the Honorable Magistrate Judge Baker entered an Order setting a evidentiary hearing as to whether sanctions should be imposed. (App. D at 14a). The evidentiary hearing was held on July 24th. In attendance at the hearing were the following individuals: Mr. James Coleman (attorney for the Blains), Mr. Pappas, Mr. Andrew Lewis (Mr. Pappas' associate and counsel for Liberty Mutual), and Mr. Donald Dietrich, a retired Federal Magistrate Judge who had acted as one of the three arbitrators of the Arbitration Panel.[2]

The evidentiary hearing began by Magistrate Judge Baker stating that the hearing had been set as a result of "the arbitration panel's report to the Court that the Defendant had failed to present *any* material at the arbitration proceeding." (Emphasis supplied). (App. I at 28a). The Court then asked Mr. Coleman if he wished to present any argument to the Court. Mr. Coleman summarized the manner in which he had argued his case at the arbitration hearing:

> Through a proffer, and both of the plaintiffs were there and both of the plaintiffs — I presented a proffer and then the arbitrators asked the plaintiffs some questions that they had.

(App. I at 30a). Additionally, Mr. Coleman made the following observation as to Mr. Lewis' conduct at the arbitration hearing:

> Mr. Lewis indicated, either in his opening or while he was being questioned, that he did not feel like anything he said would convince the arbitrators that the Blains intentionally set the fire, that he felt that the information he had was *work-product* and that he was not going to

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2. Mr. Lewis appeared at the arbitration hearing on behalf of Liberty Mutual, not Mr. Pappas. However, Mr. Pappas stated at the evidentiary hearing that he accepted full responsibility for Mr. Lewis' conduct at the arbitration hearing.

> disclose that, that he didn't think arbitration was appropriate . . .

(Emphasis supplied). (App. I at 31a). Mr. Coleman then questioned Mr. Dietrich concerning why the arbitration panel had recommended sanctions. Mr. Dietrich testified as follows:

> . . . defendant had failed to remove [sic] beyond the state court pleadings stages and was simply stating its position made of record by its answer in [sic] affirmative defenses. *There is no acknowledgment of discovery having been undertaken, no fruits of discovery reported or disclosed, no evidence — no evidentiary support by proffer or otherwise of the allegations made.*

(Emphasis supplied). (App. I at 33a).

Mr. Dietrich first testified that the basis of the arbitration panel's recommendation that sanctions be imposed was that Liberty Mutual had allegedly failed to present *any* evidence at the arbitration hearing:

> Q. So at least you, Your Honor, the reason why you recommended or agreed to recommend sanctions to the federal court is because insufficient evidence was presented to you to rule in favor of my client?
>
> A. Well, my recollection is that no evidence was presented in support of the affirmative defenses.
>
> Q. No evidence. You agree that proffer of counsel at arbitration would be evidence at an arbitration, correct?
>
> A. It's to be considered some weight, given some weight.
>
> Q. Well, need my client present live testimony to meet your standard at arbitration?
>
> A. No, sir.

(App. I at 37a). Mr. Dietrich subsequently testified that the arbitration panel recommended sanctions for Liberty Mutual's alleged failure to conduct discovery prior to the arbitration hearing:

Q. So all he had to say was there's cause and origin experts that will testify to those facts and there are officers that will testify to those facts, and that would have been sufficient?

A. It might have been sufficient without requiring the reports themselves.

As I recall, there was no acknowledgment that any discovery had been undertaken since the beginning of this case and that was part of his explanation for his not being in a position to say more. That they just didn't know at this point, at this stage, notwithstanding the time that had passed, any more than they knew when they pled to the case.

Q. Once it was removed, how soon should the depositions have been conducted?

A. Well, the arbitration rules contemplate, and the clerk of court is here in support thereof, probably that there be adequate discovery in preparation for the arbitration hearing. And apparently there was none on the part of the insurance company defendant.

Q. What deposition — are you suggesting that the recommendation for sanctions is sanctioning my client because they didn't conduct discovery?

A. *I would say that if you are going to make proffer that a claimant, plaintiff/claimant, on a fire policy had a motive to burn his home because of his financial condition, that you ought to have some evidence in support of what his financial condition is; and there was none.*

(Emphasis supplied). (App. I at 43a-44a). Mr. Dietrich initially testified that sanctions were recommended because Liberty Mutual allegedly failed to proffer any evidence beyond the averments of the pleadings. He then recanted that testimony:

Q. Sir, these answers to interrogatories, Defendant's Response to Arbitration Interrogatories, they were read into the record as part of the proffer by Mr. Lewis, correct?

A. I don't recall their reading, but I recall their being part of the record when we had the proceedings.

Q. Okay. And you would agree that much of that information goes well beyond the mere bare allegations of the pleadings and the affirmative defenses?

A. They are additional statements without evidentiary support, yes.

(App. I at 46a). Finally, Mr. Dietrich admitted that Mr. Lewis' conduct at the arbitration hearing was not a factor in the arbitration panel's decision to recommend sanctions:

Q. Did you find Mr. Lewis's presence and demeanor at the arbitration, in any way, unprofessional?

A. No.

Q. Was he rude or discourteous in any way to the panel?

A. No.

(App. I at 47a).

Mr. Lewis responded to Mr. Dietrich's statement that Liberty Mutual should have conducted discovery prior to the arbitration hearing by emphasizing that Liberty Mutual had been unable to conduct discovery due to the Blains' failure to produce their initial disclosures containing a list of relevant witnesses and documents. Mr. Lewis stated as follows:

MR. LEWIS: Aside from the fact that, as Mr. Pappas indicated, we were awaiting the pre-court disclosure required by Federal Rule 26 from opposing counsel, after the extended date, which I granted them, came and past, I

> wrote them and asked them where it was and granted them another ten days in addition to that pre-court disclosure. I did not receive a response from that until the day before the arbitration hearing, so I did not have any — to date, still have not received any disclosure from them as to the witnesses they feel are relevant to this case or the documents that they feel are relevant to this case. That's basically it.

(App. I at 60a).

In the midst of Mr. Dietrich's recanting, Magistrate Judge Baker interjected his erroneous belief as to the basis for the arbitration panel's recommendation that sanctions be entered:

> What I understand to be the issue here is that your client, through [Mr. Lewis] basically took a *cavalier attitude* towards this arbitration; that is the basis for the recommendation that was made. . . . *Well, I'm telling you, that's what I think the issue is.*

(Emphasis supplied). (App. I at 44a). Furthermore, the following exchange occurred between Mr. Pappas and Magistrate Judge Baker:

> THE COURT: I'm trying to find out what you *thought* the arbitration was going to accomplish, and I think I've heard.
>
> MR. PAPPAS: The answer is: I *thought* it was going to accomplish nothing productive.
>
> THE COURT: That's why you took the approach that you did; and frankly, it's not satisfactory.

(Emphasis supplied). (App. I at 45a).

On or about August 8, 1996, Magistrate Judge Baker entered his Report and Recommendation as to the issue of whether sanctions should be entered against Mr. Pappas. The Report and Recommendation began as follows:

> Pursuant to the referral from the presiding judge . . . , an evidentiary hearing was held July 24, 1996 on the issue raised by the report of the arbitrators concerning Defendant's *conduct* at the court-annexed arbitration hearing . . .[3]

(Emphasis supplied). (App. C at 9a). The Report and Recommendation also stated that Liberty Mutual's counsel "did not provide exhibits or references to discovery materials, witness statements or other proffered support for the defenses." (App. C at 10a). Magistrate Judge Baker also opined that "the evidence show[ed] that Mr. Pappas *concluded* in advance that the arbitration would not serve his client's interest regardless of outcome." (Emphasis supplied). (App. C at 10a). Most importantly, Magistrate Judge Baker asserted as follows:

> When a case has been referred to ADR, however . . . , the Court and other parties expect good faith participation to achieve the laudable goals of ADR. A misplaced sense of zealotry in advocacy does not override an attorney's obligation to adhere to professional standards and to comply with directives of the Court. In this case, Mr. Pappas' *approach* to the arbitration did not fulfill that mandate. . . . Defendant's *approach* insured that the arbitration would be unproductive.

(Emphasis supplied). (App. C at 12a). Magistrate Judge Baker recommended that Mr. Pappas be "reprimanded for his conduct in this regard and that costs be imposed in the total amount of $500.00 . . ." (App. C at 12a).

In response to Magistrate Judge Baker's Report and Recommendation, Mr. Pappas filed his Objection to Magistrate's Report and Recommendation of Sanctions and Request for Evidentiary Hearing and/or Oral Argument. On August 23, 1996, the

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3. Mr. Dietrich admitted at the evidentiary hearing that Mr. Lewis had not conducted himself in an inappropriate manner during the arbitration hearing.

Honorable Judge Conway entered an Order adopting the Report and Recommendation. Judge Conway stated in relevant part as follows:

> Clearly the *conduct* referred to by Judge Baker in his Report and Recommendation is counsel's failure to participate in good faith in the Court-Annexed Arbitration program. . . . It is apparent from Defendant's Objections that Mr. Pappas does not *understand* the importance of professionalism in advocacy. Nor does he appear to *understand* the importance of alternative dispute resolution. . . .

(Emphasis supplied). (App. B at 8a). Judge Conway wrote that Mr. Pappas was to be "reprimanded for his *conduct* in this case." (Emphasis supplied).

Mr. Pappas appealed the Order imposing sanctions to the Eleventh Circuit Court of Appeals, which issued an Order affirming the lower court's decision. The Eleventh Circuit stated that the sanctions imposed against Mr. Pappas did not constitute a criminal or civil contempt. (App. A at 3a-5a). Instead, the Court characterized the sanction as "analogous to a Rule 11 sanction [that did] not rise to the level of criminal contempt." (App. A at 5a). The Court concluded that "[t]he district court's conclusion that Mr. Pappas' failure to participate in good faith in the arbitration hearing justified sanctioning Mr. Pappas was not an abuse of discretion." (App. A at 6a).

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE MR. PAPPAS' FIFTH AMENDMENT RIGHT TO DUE PROCESS WAS VIOLATED.

The sanction imposed against Mr. Pappas was punitive and constituted a finding of criminal contempt. Mr. Pappas' conduct did not justify a criminal contempt sanction, and the court failed to follow the mandatory procedures set forth in Federal Rule of Criminal Procedure 42 in issuing the criminal contempt sanction. For these reasons, Mr. Pappas' Constitutional right to due process has been violated.

A. The Sanction Constituted a Criminal Contempt.

In the case of *In re Rumaker*, 646 F.2d 870 (5th Cir. 1980), an immigration and naturalization officer was held to be in contempt of court for failing to appear in court for an immigration and naturalization proceeding. *Id.* The officer was also fined $500 by the court. *Id.* One of the issues on appeal was whether the contempt order was criminal or civil in nature. *Id.*

The appellate court in *Rumaker* began its analysis by stating that a determination as to whether a contempt order is civil or criminal in nature depends on the "nature and purpose of the imposed penalty." *Id.* at 872. The court explained the difference between the nature and purpose of criminal contempt orders and civil contempt orders as follows:

> [c]ivil contempt is remedial; the penalty serves to enforce compliance with a court order or to compensate an injured party. Criminal contempt is punitive; the penalty serves to vindicate the authority of the court and does not terminate upon compliance with the court order.

Id. at 870. Based on these standards, the court concluded that the $500 fine imposed against the officer was criminal in nature. *Id.* As a basis for its ruling, the court noted that the fine was non-coercive, unconditional and could not be mitigated by the officer complying with the court order. *Id.*

As stated by the *Rumaker* court, a criminal contempt order is characterized by its intent to punish rather than coerce. *See also Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983). In short, a criminal contempt order is intended to "vindicate the authority of the court by punishing the alleged wrongdoer." *United States v. Hilburn*, 625 F.2d 1177 (5th Cir. 1980). Clearly, the sanction imposed against Mr. Pappas constituted a criminal contempt order. The lower court imposed the sanction with the intent to punish Mr. Pappas, and he was not given the opportunity to purge himself of the fine.

B. The Necessary Elements of Criminal Contempt Were Not Proven.

Chapter 18, Section 401 of the United States Code provides a federal court with the power to impose a criminal contempt order. *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981). Section 401 states as follows:

> Section 401. Power of Court.
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as — 1) misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; 2) misbehavior of any of its officers and their official transactions; 3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1997). For an attorney's conduct to be punishable under 18 U.S.C. § 401(1), an attorney must behave in a way that actually obstructs a judge in performing his duties. *Thoreen*, 653 F.2d at 1339. Most importantly, a criminal contempt order shall not be imposed unless the alleged offending party is found to have the intent to obstruct justice. *Id.* Additionally, this intent "must be proven beyond a reasonable doubt." *Id.*

The record below is devoid of any allegation that Mr. Pappas attempted to obstruct justice. Additionally, the District Court never conducted an evidentiary hearing to establish that Mr. Pappas acted with the intent to obstruct justice. The only inquiry conducted into the issue of Mr. Pappas' intent occurred during the following exchange at the evidentiary hearing before Magistrate Judge Baker:

> THE COURT: You honestly *believe* that you prepared for that hearing in good faith?
>
> MR. PAPPAS: Absolutely, Your Honor, absolutely.

(Emphasis supplied). (App. I at 58a). Therefore, the Court had no basis to issue an order constituting a criminal contempt sanction against Mr. Pappas.

C. The Court Failed to Follow the Mandatory Procedures Set Forth in Federal Rule of Criminal Procedure 42 in Issuing the Criminal Contempt Sanction.

Federal Rule of Criminal Procedure 42 sets forth the procedures that must be followed in initiating a criminal contempt proceeding. *Universal City Studios v. N.Y. Broadway Int'l Corp.*, 705 F.2d 94 (2nd Cir. 1983). Federal Rule of Criminal Procedure 42 states as follows:

> (a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Fed. R. Crim. P. 42 (1997). The instant case does not fall under section (a) of the rule for two reasons. First, the proceeding from which the

sanction was derived occurred in front of an arbitration panel, not a judge. Second, the sanction was not imposed "summarily." The sanction was only imposed after the Arbitration Panel recommended the sanction, Magistrate Judge Baker held an evidentiary hearing on the issue, and District Court Judge Conway approved the "findings" of the Magistrate Judge and the Arbitration Panel.

The procedures set forth in Federal Rule of Criminal Procedure 42(b) were not followed by the Court in imposing the sanction. Rule 42(b) states that criminal contempt may only be prosecuted upon notice. At no time was Mr. Pappas advised that a hearing would be conducted to determine if he should be held in criminal contempt. Furthermore, the evidentiary hearing was never characterized as a criminal contempt hearing. The Court's failure to notify Mr. Pappas of the fact that he could be held in criminal contempt violated the notice provision of Rule 42(b). As noted by the court in *Broadway*:

> [c]orrect understanding of the nature of the proceedings is vital since a person facing criminal contempt is exposed to significant penalties and is entitled to procedural rights not available in civil contempt proceedings.

Broadway, 705 F.2d at 97.

The importance of adherence to procedural safeguards was discussed in the case of *Chambers v. Nasco*, 501 U.S. 32 (1991). In *Nasco*, this Court held that a federal court may award attorney's fees against a party based on a court's inherent power to sanction a party for bad faith conduct. *Id.* In their dissent, Justices Rehnquist, Kennedy, and Souter explained that a court's inherent power should only be exercised when the relevant conduct does not fall under the rubric of a statute or rule that provides for the imposition of sanctions in such a situation. *Id.* These Justices prophetically stated as follows:

> definite standards give litigants notice of proscribed conduct and make possible meaningful review for misuse of discretion. . . . By contrast, courts apply inherent powers without specific definitional or procedural limits . . .

Id. at 65-66.

The District Court below improperly used inherent power to issue a criminal contempt sanction against Mr. Pappas. By issuing the criminal contempt sanction without following the procedural safeguards of Federal Rule of Criminal Procedure 42, the court violated Mr. Pappas' Constitutional right to due process. The dangers of unchecked inherent powers prophesied by Justices Rehnquist, Kennedy, and Souter have come to fruition.

D. Mr. Pappas' Due Process Rights Have Been Violated.

In *Remington Rand Corp. v. Business Systems, Inc.*, 830 F.2d 1256 (3rd Cir. 1987), a corporation's trustee was held in contempt by a district court. *Id.* The court also ordered the trustee to pay attorney's fees to the opposing party due to the trustee's alleged wrongful conduct. *Id.* The trustee appealed the order of contempt and attorney's fees. *Id.* On appeal, the Third Circuit Court of Appeals stated as follows:

> [d]ue process requires that, before one is subjected to a court's contempt powers, one is entitled to notice that he is being so charged. . . . To evaluate whether the notice given to [the trustee] in this case was sufficient, we look to the notice requirement in [Federal Rule of Criminal Procedure] 42(b).

Id. at 1258. Applying this standard, the court found that the trustee only had an "inkling that he might be held in contempt." *Id.* The court held that "an inkling is not enough to subject one to potential incarceration or monetary penalties." *Id.* Accordingly, the court concluded that the notice provided to the trustee was insufficient to meet the standards imposed by Federal Rule of Criminal Procedure 42(b), and reversed the contempt order and attorneys' fee sanction against the trustee. *Id.*

The Fifth Amendment to the United States Constitution provides in relevant part as follows: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The lower court imposed a criminal contempt sanction against Mr. Pappas without providing him prior notice that he could be held in criminal contempt. Therefore, pursuant to the dictates of *Remington*, Mr. Pappas was denied his Constitutional right to due process.

Criminal contempt is a crime in the ordinary sense. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994) (*quoting Bloom v. Illinois*, 391 U.S. 194 (1968)). Shockingly, although Mr. Pappas violated no court order, no statute, nor any ethical rule, he was convicted of a crime, and deprived of his property as punishment. Even a lawyer appearing before a federal court retains his fundamental Constitutional rights.

II. THE PETITION SHOULD BE GRANTED BECAUSE MR. PAPPAS' FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH WAS VIOLATED.

Throughout the proceedings that concluded in the imposition of a monetary fine against Mr. Pappas, the reason why Mr. Pappas was being sanctioned repeatedly changed. This was, in part, the result of a failure to comply with fundamental due process safeguards. Each of the following was subsequently substituted for its predecessor as "justification" for the imposition of sanctions:

1) failing to proffer any evidence;

2) failing to proffer sufficient evidence;

3) failing to conduct discovery;

4) Mr. Pappas' alleged cavalier attitude during the arbitration hearing; or

5) Mr. Pappas' belief that the non-binding arbitration would not be productive.

The record below indisputably shows that sufficient evidence *was* proffered at the arbitration hearing. The record below indisputably shows that Mr. Pappas was prevented from conducting discovery because of the Local Rules of the Middle District of Florida, and the Blains' failure to provide the names of individuals possessing discoverable information, and a list of documents relevant to the issues in dispute. The courts below never charged or otherwise accused Mr. Pappas of violating any court order or ethical rule. Furthermore, the evidence demonstrates that counsel for Liberty Mutual, Mr. Pappas,

did not conduct himself in an inappropriate, let alone sanctionable, manner at any time during the arbitration hearing.

At the evidentiary hearing, Mr. Pappas requested the court to provide him with guidance as to what he had done wrong:

> MR. PAPPAS: But having said that, we are here for sanctions to be imposed. I take full responsibility for this. If I did something wrong, I need to know what not to do wrong in the future. I have never been sanctioned before in the 14 years I practiced law. I want to know, Sir, next time, what more should we have done? What is the degree that we have [failed]?
>
> I think, with all due respect, that if this Court is about to invoke sanctions against me, that I be provided the degree that I failed. What evidence did I fail to present . . . in the proffer that would have avoided sanctions?
>
> * * *
>
> MR. PAPPAS: If I failed in that balancing act to do it the right way, I apologize. But I would like for some direction in the future as to — if we are not going to have many [sic] trial requirements and proffers, simply proffers are not enough, then what is enough to avoid the wrath of this Court, which I do not and never want, never want to incur. And I certainly don't want to offend arbitrators who have better things to do with their time then to volunteer for this process.
>
> Having said all that, if there are any questions this Court has of me, I will gladly, under oath, answer them to the best of my ability.
>
> THE COURT: Anything else?

(App. I at 58a, 60a). The record is devoid of any quantifiable or describable misconduct of Mr. Pappas notwithstanding his plea for guidance. A fundamental Constitutional safeguard must exist and there can be no punishment without justification. As the dialogue

quoted above reveals, the court below could not articulate justification for its imposition of sanctions. The reason that the court could not articulate justification for the imposition of sanctions was because none existed.

Obviously, Mr. Pappas was sanctioned for expressing his belief that the arbitration would not be productive. Accordingly, Mr. Pappas' Constitutional right to freedom of speech was violated.

A. Mr. Pappas Did Not Violate Federal Rule of Civil Procedure 11.

Federal Rule of Civil Procedure 11 states in relevant part as follows:

> (b) **Representations to Court**. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
>
> (1) it is not presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegation and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation of discovery; and

> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
>
> (c) **Sanctions**. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

Fed. R. Civ. P. 11. Federal Rule of Civil Procedure 11 provides that an attorney may be sanctioned if he improperly files a court paper. *Chambers v. Nasco*, 501 U.S. 32 (1991). Throughout the record of these proceedings, there has been no allegation that Mr. Pappas was sanctioned because of any paper he filed with the court. Additionally, the Eleventh Circuit admitted in its opinion affirming the imposition of sanctions against Mr. Pappas that the sanction was not imposed pursuant to Federal Rule of Civil Procedure 11.

B. Mr. Pappas Was Not Held in Civil Contempt.

"Two requirements must be met before a party may be held in civil contempt: the court must have fashioned an order that is clear and reasonably specific, and a party must have violated that order." *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. 1999). Mr. Pappas has never violated any court order in this case, and there has never been an allegation that Mr. Pappas violated any court order. Furthermore, the Eleventh Circuit also admitted in its order affirming the imposition of sanctions that Mr. Pappas was not held in civil contempt. Therefore, it cannot be argued that the monetary fine constituted a civil contempt order.

C. Mr. Pappas Was Not Sanctioned Due to His Alleged Failure to Present Adequate Evidence At The Arbitration Hearing.

After the arbitration hearing, the arbitration panel issued a Report and Recommendation stating as follows: "the Defendant . . . failed to present *any* evidence upon which a panel could find for the Defendant . . . [a]ccordingly, this panel recommends that the Judge consider appropriate sanctions." (Emphasis supplied). (App. F at 19a). Mr. Pappas filed his Motion to Strike, and Objection to, Arbitrators' Recommendation of Sanctions, which was denied by the Honorable Judge Conway in an Order dated July 10, 1996. In that Order, Judge Conway stated that the "arbitration panel certainly had the authority to notify this Court that one of the parties has *failed to complete the appropriate level of discovery prior to the hearing, which is sanctionable by this Court.*" (Emphasis supplied). (App. E at 17a). Judge Conway then referred the matter to Magistrate Judge Baker, who set an evidentiary hearing as to whether sanctions should be imposed against Mr. Pappas.

Magistrate Judge Baker started the evidentiary hearing by commenting as follows:

> THE COURT: All right. I set this matter for hearing this morning in response to Judge Conway's order, which was as a result of the arbitration panel's report to The Court indicating that the defendant had failed to present *any* material at the arbitration proceeding . . .

(Emphasis supplied). (App. I at 28a). In explaining the arbitration panel's decision to recommend sanctions, Mr. Dietrich first testified as follows:

> A. . . . My personal view for joining in the report to The Court was that I considered that the defendant had failed to remove [sic] beyond the state court pleadings stages and was simply stating its position made of record by its answer in [sic] affirmative defenses. . .

(App. I at 33a). However, Mr. Dietrich subsequently recanted his initial testimony that Mr. Pappas had failed to move "beyond the state court pleadings stages . . . :"

A. Well, my recollection is that no evidence was presented in support of the affirmative defenses.

Q. No evidence. You agree that proffer of counsel at arbitration would be evidence at an arbitration, correct?

A. It's to be considered some weight, given some weight.

Q. Well, need my client present live testimony to meet your standard at arbitration?

A. No, no.

Q. So it could be proffered by Mr. Lewis, correct?

A. But he made no more than a reiteration or a statement of the affirmative defenses, no reasons, no explanations.

* * *

Q. Did he read the answers to interrogatories, sir, in which he said that both fires were incendiary in origin? "Evidence of a regular floor-level burning was readily apparent indicating the presence of liquid accelerants. At least one of the plaintiffs had an opportunity to set both fires. The residence was secured prior to the time of both fires."

That was all read to you, was it not?

A. Whether or not it was read or not, I acknowledge it was part of the record; but there was nothing in support of the statements.

* * *

Q. There was no evidence of forced entry. That was proffered, that's not in the pleadings, correct, sir?

A. You can do down one by one if you want and I'll acknowledge that's true, but it doesn't amount to anything.

(App. I at 36a, 38a and 43a). As evidenced by this exchange, Dietrich simply disliked the quality and quantity of the proffer — hardly a basis for a public reprimand and monetary fine.

Even if Mr. Pappas' alleged failure to present evidence had been the basis for the sanction, any failure to obtain additional evidence through discovery cannot be blamed on Mr. Pappas, or Liberty Mutual. The Local Rules of the Middle District of Florida provide that discovery cannot be conducted until after the parties conduct their Case Management meeting. *See* M.D. Fla. L.R. 3.10(c)(2)(B). Through no fault of Mr. Pappas, or Liberty Mutual, the parties did not conduct their Case Management meeting until April 12, 1996. Furthermore, the Blains did not provide their initial disclosures specifying the individuals possessing discoverable information, and identifying relevant documentation, until *after* the arbitration hearing.

D. Mr. Pappas Was Not Sanctioned Because of His Alleged Cavalier Attitude.

After Mr. Dietrich recanted his allegation that Mr. Pappas had allegedly failed to present any evidence, Magistrate Judge Baker suddenly changed the Court's interpretation of the basis upon which sanctions would be awarded. Magistrate Judge Baker stated as follows:

> THE COURT: What I understand to be the issue here is that your client, through your colleague, basically took a *cavalier attitude* towards this arbitration; that is the basis for the recommendation that was made. . . . Well, I'm telling you, that's what I think the issue is . . .

(Emphasis supplied). (App. I at 44a). Thus, in the midst of this evidentiary hearing for sanctions, the alleged basis upon which sanctions would be imposed changed from Mr. Pappas' alleged failure to present adequate evidence to Mr. Pappas' alleged "cavalier attitude towards . . . arbitration."

In the Magistrate Judge's Report and Recommendation issued after the evidentiary hearing, Magistrate Judge Baker stated that "an evidentiary hearing was held . . . *concerning Defendant's conduct* at the court-annexed arbitration hearing." (Emphasis supplied). (App.

C at 9a). Magistrate Judge Baker concluded in his Report and Recommendation that Mr. Pappas should be "reprimanded for his *conduct* . . ." (Emphasis supplied). (App. C at 12a). In the Order ratifying Magistrate Judge Baker's Report and Recommendation, Judge Conway also held that Mr. Pappas be "reprimanded for his *conduct* in the case." (Emphasis supplied). (App. B at 8a). Finally, in its Order affirming Judge Conway's ruling, the Eleventh Circuit stated that Mr. Pappas had been "sanctioned by the district court for his *conduct* . . ." (Emphasis supplied). (App. A at 2a).

Although Magistrate Judge Baker stated that the basis for the imposition of sanctions against Mr. Pappas was Mr. Pappas' alleged "cavalier attitude," Judge Conway, the Eleventh Circuit Court of Appeals, and Magistrate Judge Baker himself, identified Mr. Pappas' alleged improper conduct as the basis for the imposition of sanctions. Therefore, Mr. Pappas was not sanctioned for his alleged "cavalier attitude."

E. Mr. Pappas Was Not Sanctioned For His Alleged Improper Conduct.

After Magistrate Judge Baker stated that the issue before the court was whether Mr. Pappas should be sanctioned due to his "cavalier attitude towards [the] arbitration," Mr. Pappas then asked Mr. Dietrich whether he had found Mr. Lewis' conduct at the arbitration hearing to be improper:

> Q. Did you find Mr. Lewis's presence and demeanor at the arbitration, in any way, unprofessional?
>
> A. No.
>
> Q. Was he rude or discourteous in any way to the panel?
>
> A. No.

(App. I at 47a). After Mr. Dietrich testified that Mr. Lewis' conduct was not improper, Magistrate Judge Baker yet again changed the "sanctionable" issue, as evidenced by the following exchange:

> THE COURT: I'm trying to find out what you *thought* the arbitration was going to accomplish, and I think I've heard.
>
> MR. PAPPAS: The answer is: *I thought it was going to accomplish nothing productive.*
>
> THE COURT: That's why you took the approach that you did; and frankly, it's not satisfactory.

(Emphasis supplied). (App. I at 56a). Therefore, Magistrate Baker admitted that the determination of whether sanctions would be imposed against Mr. Pappas would depend on what Mr. Pappas *thought* of the arbitration process. Mr. Pappas expressed his belief that the arbitration would "accomplish nothing productive." Magistrate Judge Baker reacted to this statement by recommending that sanctions be imposed against Mr. Pappas. *Mr. Pappas was clearly sanctioned for his thoughts and the expression of his thoughts.* Therefore, failing to articulate any sanctionable conduct, the lower court fell upon the tired refrain of punishment for the expression of one's beliefs. One could hear the 450 year old bones of Sir Thomas More rattle with disgust.

F. Mr. Pappas' First Amendment Right to Free Speech Has Been Violated.

The First Amendment to the United States Constitution states in relevant part as follows: "Congress shall make no law . . . abridging the freedom of speech."

> The First Amendment in its respect for the conscience of the individual knows the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the Constitutional right to be let alone.

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) (Douglas, J., dissenting).

> As the makers of our Constitution understood to secure conditions favorable to the pursuit of happiness . . . they sought to protect Americans in their beliefs, their thoughts,

> their emotions, and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valuable to civilized man.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). As was stated as early as 1774 in a letter from the Continental Congress to the inhabitants of Quebec:

> All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon a limited area of more important interest . . .

Roth v. United States, 354 U.S. 476 (1957) (*citing* the Continental Congress' letter to the inhabitants of Quebec, 1774).

Clearly, Mr. Pappas was not sanctioned for failing to present sufficient evidence at the arbitration hearing. If so, every trial or motion lost would be grounds for public reprimand and monetary penalty. Obviously, Mr. Pappas was not sanctioned for improper conduct. Mr. Pappas was punished in this case by a governmental entity for possessing, and expressing, an idea that was considered incorrect and contrary to the purposes of alternative dispute resolution. Mr. Pappas only expressed this belief when the court inquired as to what Mr. Pappas "thought the arbitration was going to accomplish . . ." The record indisputably establishes that Mr. Pappas was reprimanded, and his property taken from him as punishment, not for any proscribed conduct, but rather because he expressed thoughts with which the district court disagreed. By sanctioning Mr. Pappas for possessing certain beliefs, and expressing those beliefs when requested to do so by the Court, the Court violated Mr. Pappas' Constitutional right to formulate thoughts and express them openly and honestly.

CONCLUSION

A lawyer appearing before a federal court is protected in full by the United States Constitution. A lawyer's expressed beliefs solicited by that court cannot be grounds for sanction.

For these reasons, Mr. Pappas respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 1, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-3680
Non-Argument Calendar

D. C. Docket No. 96-227-CIV-ORL-22

JEAN BLAIN, YELVA BLAIN,

Plaintiffs-Appellees,

versus

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation,

Defendant,

JOHN J. PAPPAS,

Movant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(February 1, 1999)

Before TJOFLAT, ANDERSON and EDMONDSON, Circuit Judges.

Appendix A

PER CURIAM:

Appellant Pappas serves as an attorney for Liberty Mutual Fire Insurance Company ("Liberty") in the action underlying this appeal. In that case, the Blains have sued Liberty for failure to pay a claim under their insurance policy. During the course of those proceedings, Pappas was sanctioned by the district court for his conduct before an arbitration panel. Because we find no abuse of discretion in the district court's decision to sanction Pappas, we affirm.

FACTS

Jean and Yelva Blain had an insurance policy with Liberty. After two fires within six days in March of 1995, the Blains filed a claim with Liberty to collect the proceeds from their policy. Liberty investigated the fire and denied the claim, claiming that the fire was intentionally set by the Blains. On January 30, 1996, the Blains sued Liberty in a Florida district court. Liberty removed the case to the United States District Court for the Middle District of Florida on March 1, 1996.[1]

Pursuant to Local Rule 8.02, the district court referred the matter to the Court Annexed Arbitration Program. A hearing was held before an arbitration panel on June 25, 1996, in which the attorney for the plaintiff presented a proffer lasting about 50 minutes, followed by questioning of the Blains by the panel for approximately one hour. The attorney

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1. Removal was premised on diversity jurisdiction. *See* 28 U.S.C. § 1332.

for Liberty[2] presented a proffer of approximately ten minutes and, in response to questions from the panel, would not provide any supporting information for the allegations made in the proffer.

After the hearing, the panel found for the Blains and recommended some form of sanctions. The district court referred the matter of sanctions to a magistrate judge, who recommended that Mr. Pappas be sanctioned "in the amount of $500. On August 23, 1996, the district court adopted the magistrate judge's report. Mr. Pappas then filed this appeal, in which he alleges, among other things, that the sanctions applied were criminal contempt sanctions implicating special procedural protections with which the district court failed to comply and that he met the requirements for participating in the arbitration proceedings.[3]

DISCUSSION

A district court's characterization of sanctions as either civil or criminal is reviewed de novo. *See, e.g., In re E.I.*

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2. Liberty was represented at the hearing by Mr. Andrew Lewis, an associate with Butler, Burnette & Pappas, the firm representing Liberty. Mr. Pappas has admitted that Mr. Lewis' actions at the hearing were taken pursuant to his direction and that Mr. Pappas bears complete responsibility for any misconduct.

3. Mr. Pappas makes several additional claims, including that the arbitration panel lacked the authority to recommend sanctions. All the panel did was make a recommendation, however. There would seem to be no more effective way to provide notice to the district court of potentially sanctionable conduct. This claim, like the others, is meritless and warrants no further discussion.

DuPont De Nemours & Company-Benlate Litigation, 99 F.3d 363, 367 (11th Cir. 1996). An order sanctioning a party or attorney is reviewed under a deferential abuse of discretion standard. *See, e.g., Battles v. City of Ft. Myers*, 127 F.3d 1298, 1300 (11th Cir. 1997) (applying this standard in the Rule 11 context).

A basic understanding of the arbitration rules at issue in this case is necessary to evaluate properly Mr. Pappas' claims. The Middle District of Florida has adopted local rules that mandate arbitration in certain classes of cases such as this one, *see* M.D. Fla. Local Rule 8.02(a)(2), while preserving the right to demand a trial de novo subsequent to the arbitration panel's findings, *see id.* Rule 8.01(a). The purpose of these rules is "to provide an alternative mechanism for the resolution of civil disputes (a Court annexed, mandatory arbitration procedure) leading to an early disposition of many civil cases with resultant savings in time and costs to the litigants and to the Court." *See id.*

We address first the contention that the sanctions imposed are best characterized as a criminal contempt citation. In *Donaldson v. Clark*, 819 F.2d 1551, 1558-59 (11th Cir. 1987), we held that sanctions of an attorney under Federal Rule of Civil Procedure 11 did not amount to a criminal contempt citation. We noted the special responsibility of an attorney, as compared to a member of the general public, in a judicial proceeding and further stated that applying intricate procedures in the Rule 11 context would run contrary to the purpose of the Rule in deterring burdensome and unnecessary litigation. *See id.* at 1559. The sanctions applied in this case are closely analogous to Rule 11 sanctions. The district court

found that Mr. Pappas' conduct at the arbitration proceeding (through Mr. Lewis) precluded the proceeding from serving its function of encouraging the expeditious handling of lawsuits. On the basis of *Donaldson v. Clark*, we reject Pappas' claim of entitlement to the procedures which must accompany criminal contempt. The sanction at issue here is analogous to a Rule 11 sanction and does not rise to the level of criminal contempt.

Having concluded that the sanctions ordered in this case need not comply with the criminal contempt procedures, we now address whether the district court abused its discretion in applying sanctions. After careful review, we conclude that there is sufficient evidence to support the district court's imposition of the sanctions at issue.

Mr. Pappas argues that the rules do not require a party to attend the proceedings, so he should not be sanctioned for doing more than they require. Mr. Pappas cites M.D. Fla. Local Rule 8.04(b), which provides that "[t]he arbitration hearing may proceed in the absence of a party who, after due notice, fails to be present; but an award of damages shall not be based solely upon the absence of a party." He equates "award of damages" in the last clause with "sanctions," so that the Rule would preclude sanctions based on a party's absence. *See* Appellant's Brief, at 34.

We find this reading implausible. The natural reading of the provision is that it simply prohibits the panel from entering a default judgment for the plaintiff without the plaintiff presenting any supporting evidence. This reading is bolstered by its similarity to the requirement of this circuit that, as long

as the non-appearing party has participated fully in pretrial matters and contested the issue, a default judgment is not appropriate and the party bearing the burden of proof must present some evidence of its claim before judgment can be entered without the presence of the opposing party. *See Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130, 1134 (11th Cir. 1986). Thus, merely because a party does not attend a mandated arbitration hearing does not insulate him from sanctions. There is, therefore, no inconsistency between the court's imposition of sanctions on Mr. Pappas and M.D. Fla. Local Rule 8.04(b).

The district court's conclusion that Mr. Pappas' failure to participate in good faith in the arbitration hearing justified sanctioning Mr. Pappas was not an abuse of discretion.

The judgment is AFFIRMED.[4]

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4. Appellant's request for oral argument is denied.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED AUGUST 23, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 96-227-CIV-ORL-22

JEAN BLAIN and YELVA BLAIN,

Plaintiff

– vs –

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant

ORDER

This matter was considered by the United States Magistrate Judge pursuant to a reference dated July 10, 1996 (Doc.28), who has filed his report recommending that the Mr. Pappas be reprimanded for his conduct and that costs be imposed in the amount of $500.00.

Upon consideration of the Report and Recommendation of the Magistrate Judge, to which an objection has been filed, and upon this Court's independent examination of the file, the Magistrate Judge's Report and Recommendation (Doc. 18) is adopted and confirmed and made a part hereof.

Appendix B

Clearly, the conduct referred to by Judge Baker in his Report and Recommendation is counsel's failure to participate in good faith in the Court Annexed Arbitration program. The Court does not consider compliance with the requirement of filing a motion to be excused from Arbitration as a technicality. It is apparent from Defendant's Objections (Doc.35) that Mr. Pappas does not understand the importance of professionalism in advocacy. Nor does he appear to understand the importance of alternative dispute resolution. Mr. Pappas' excuses for his conduct presented in the Objections do not merit further response.

It is ORDERED:

1. Attorney John J. Pappas is reprimanded for his conduct in this case.

2. Costs are imposed against Mr. Pappas in the amount of $500.00, half of which is payable to Plaintiff and half to the United States Treasury. Payment is to be made by September 23, 1996.

DONE AND ORDERED in Chambers, Orlando, Florida, this 23rd day of August, 1996.

s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED AUGUST 8, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 96-227-Civ-Orl-22

JEAN BLAIN and YELVA BLAIN, husband and wife,

Plaintiffs,

– vs –

LIBERTY MUTUAL FIRE INSURANCE COMPANY, a foreign corporation,

Defendant.

REPORT AND RECOMMENDATION

TO THE UNITED STATES DISTRICT COURT

Pursuant to the referral from the presiding judge (Doc. No. 28), an evidentiary hearing was held July 24, 1996 on the issues raised by the report of the arbitrators concerning Defendant's conduct at the court-annexed arbitration hearing conducted pursuant to Chapter 8 of the Local Rules of this Court.

Appendix C

At the hearing Plaintiffs proffered what occurred at the arbitration, and this proffer was confirmed by the testimony of one of the arbitrators, Donald P. Dietrich.[1] John Pappas, lead counsel for Defendant also testified. Mr. Pappas stressed that he, personally,[2] was responsible for whatever occurred at the arbitration.

The record indicates Defendant appeared at the arbitration by counsel and a suitable non-attorney representative as required by Local Rule 8.04(d). Following a detailed presentation by Plaintiffs' counsel, as contemplated by the Court's Arbitration Handout, Defendant's counsel gave a summary of his client's position. This presentation was little more than a reiteration of the affirmative defenses and positions stated in answers to the arbitration interrogatories. Counsel did not provide exhibits or references to discovery materials, witness statements or other proffered support for the defenses.

As a result, issue was not meaningfully joined in the case. The evidence shows that Mr. Pappas concluded in advance that the arbitration would not serve his client's interest regardless of outcome. He also apparently believed that meaningful participation in the process would provide Plaintiff with "free discovery."

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1. The Chairman of the arbitration panel did not testify but was available by telephone had his testimony been necessary.

2. As distinguished from his client or his colleague, Andrew Lewis, who actually attended the arbitration.

Appendix C

In addition to his tactical analysis, Mr. Pappas indicated a lack of discovery as a basis for failing to participate fully in the arbitration.

The following circumstances were also established. Defendant removed this action to this Court March 1, 1996. Counsel met April 12, 1996 to discuss case management issues and filed the joint Case Management Report April 29, 1996. At no time did Defendant move to take this case out of Chapter 8 arbitration. At no time did Defendant attempt to take depositions of Plaintiffs in this case.[3]

The purposes of the Court's arbitration program, pursuant to statutory mandate, include encouraging the early and expeditious resolution of litigation without trial and facilitating the exchange of the parties' real views so that cases will be more likely to settle. Even if the parties do not accept the arbitrators' award, the process often results in later settlements because the parties have had the opportunity to hear basis for the opposing position. Furthermore, discovery and other trial preparation are often made less onerous based on a good faith exchange of information and contentions at the arbitration.

Many cases are not suitable for arbitration and may not realize these benefits. It is therefore possible by motion to remove cases from the arbitration program. Indeed, one of the important purposes of the pretrial case management process is for counsel to discuss the most suitable form of

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3. Defendant did have pre-litigation benefit of releases, sworn statements and investigatory sworn questioning of both Defendants.

alternate dispute resolution (ADR) in a particular case. If the parties agree, they can stipulate. If they disagree, either can file a motion so the Court can determine what form of ADR (if any) should be used. It is certainly not the intent of the Court that parties participate in any kind of ADR unless there is a reasonable prospective benefit.

When a case has been referred to ADR, however (either due to automatic application of Chapter 8 or by order), the Court and other parties expect good faith participation to achieve the laudable goals of ADR. A misplaced sense of zealotry in advocacy does not override an attorney's obligation to adhere to professional standards and to comply with directives of the Court.

In this case, Mr. Pappas' approach to the arbitration did not fulfill that mandate. Having failed even to seek leave to take the case out of arbitration, Mr. Pappas was bound on behalf of his client to prepare for the arbitration as contemplated under the arbitration rules and handout.

The half-hearted presentation made at the arbitration was no more than going through the motions of participation. Defendant's approach insured that the arbitration would be unproductive. This is not good faith compliance with the letter or spirit of the arbitration rules.

It is respectfully recommended that Mr. Pappas be reprimanded for his conduct in this regard and that costs be imposed in the total amount of **$500.00**, half of which be payable to Plaintiff and half to the United States Treasury.

Appendix C

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on August 8, 1996.

s/ David A. Baker
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER SETTING EVIDENTIARY HEARING IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED JULY 12, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 96-227-Civ-Orl-22

JEAN BLAIN and YELVA BLAIN,
husband and wife,

Plaintiff

– vs –

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation,

Defendant

ORDER SETTING EVIDENTIARY HEARING

This cause came on for consideration upon the referral (Doc. No. 28) by the presiding judge to the undersigned of the issue of whether sanctions should be awarded for Defendant's inadequate preparation and presentation at the arbitration hearing. Therefore, a hearing on this issue is set for **WEDNESDAY, JULY 24, 1996** at **9:00 A.M.** before the undersigned in Courtroom #6, George C. Young U.S.

Appendix D

Courthouse and Federal Building, 80 North Hughey Avenue, Orlando, Florida.

The Chairman of the arbitration panel or his designee shall be available to provide a factual basis for the matters stated in the arbitrators' Report and Recommendation (Doc. No. 23). The parties may present other pertinent evidence at the hearing. One hour has been set aside on the Court's calendar to conclude this hearing.

DONE and **ORDERED** in Orlando, Florida on July 12, 1996.

s/ David A. Baker
DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED JULY 10, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 96-227-CIV-ORL-22

JEAN BLAIN, et al.,

Plaintiffs

– vs –

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant

ORDER

This cause comes before the Court on Defendant's Motion to Strike, and Objection To, Arbitrators' Recommendation of Sanctions (Doc. 24).

The Court denies Defendant's motion to strike. Upon referral to arbitration, the parties are sent a standard "Arbitration Handout" which describes their responsibilities. Under the section entitled, "Anticipated Scope of Discovery," the parties are told

Appendix E

> Failure to undertake and complete adequate discovery prior to the hearing may result in the imposition of sanctions against the inadequately prepared party. . . . [I]t is incumbent upon counsel to start discovery early and to plan on completing the essential elements of that discovery prior to the scheduled hearing date.

Defendant argues that it "felt arbitration at this juncture would not be constructive . . . [because] discovery had only just begun and no depositions had even taken place." Doc. 24 at 1. According to documentation in the Court's file, this case was filed in state court on January 29, 1996 and removed to federal court on March 5, 1996. The arbitration took place on June 25, 1996. The Defendant had in excess of four months to proceed with discovery sufficient to prepare for the arbitration hearing.

Defendant moves to strike the Arbitration panel's recommendation to the Court that "the Judge consider appropriate sanctions." Doc. 23. Regardless of how the notice was styled, the arbitration panel certainly had the authority to notify this Court that one of the parties had failed to complete the appropriate level of discovery prior to the hearing, which is sanctionable by this Court. The Court must rely on notification from the arbitration panel of inadequately prepared parties if the Court is to meaningfully implement the purpose of the court-annexed arbitration program, that is, to promote the early disposition of many civil cases with resultant savings in time and costs to the litigants and to the Court. To do otherwise would allow inadequately prepared parties to circumvent the arbitration program and waste judicial resources, as may have occurred in this case.

Appendix E

The Court takes notice of the Defendant's potentially sanctionable conduct arising from the arbitration hearing. However, the Court will not rely on the recommendation as a factual finding. The arbitration panel's "Report and Recommendation" of sanctions and Defendant's Objection to Arbitrators' Recommendation of Sanctions are hereby recommended to Magistrate Judge David A. Baker for ruling, or if necessary for report and recommendation,[1] on the issue of whether sanctions should be awarded for Defendant's inadequate preparation and presentation at the arbitration hearing.

Based on the foregoing, it is ordered as follows:

1. Defendant's Motion to Strike, and Objection To, Arbitrators' Recommendation of Sanctions (Doc. 24) is DENIED in part, and referred in part.

DONE AND ORDERED in Chambers, Orlando, Florida, this 10th day of July, 1996.

s/ Anne C. Conway
ANNE C. CONWAY
United States District Judge

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1. *See* Local Rule 6.01(18).

APPENDIX F — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED JUNE 25, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 96-227-CIV-ORL-22

JEAN BLAIN, et al.

Plaintiff(s),

– v –

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant(s).

REPORT AND RECOMMENDATION

This file reflects that the Defendant removed this matter to this Court and is presumed to know the precise rules of this Court as to Arbitration proceedings. The Defendant however, failed to present any evidence upon which the panel could find for the Defendant.

Accordingly, this panel recommends that the Judge consider appropriate sanctions.

Dated this 25th day of June, 1996.

s/ James W. Markel
Arbitration Chairman
James W. Markel, Esquire

s/ Donald P. Dietrich
Arbitrator
Hon. Donald P. Dietrich,
U.S. Magistrate Judge,
Ret.

s/ J. Michael Matthews
Arbitrator
J. Michael Matthews,
Esquire

APPENDIX G — ARBITRATION AWARD OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED AND FILED JUNE 25, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 96-227-CIV-ORL-22

JEAN BLAIN, YELVA BLAIN,

Plaintiff(s),

– v –

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant(s).

ARBITRATION AWARD

Pursuant to Local Rule 8.05(a), the following Arbitration Award is hereby rendered:

Based on the evidence before us the defendant has failed to meet its burden of proof as to the affirmative defenses raised.

We find for the plaintiffs in the amount of $163,273.00, which amount does not include interest or attorneys fees.

Appendix G

In accordance with Local Rule 8.06(a), as amended on June 15, 1989, if a demand for trial de novo is not filed and the costs of the arbitrators' fees not deposited with the Clerk within (30) days after the filing of the award, a civil judgment shall be entered pursuant to Local Rule 8.05(b)(2).

DATED this 25 day of JUNE, 1996.

s/ James W. Markel
Arbitration Chairman
James W. Markel, Esquire

s/ Donald P. Dietrich
Arbitrator
Hon. Donald P. Dietrich,
U.S. Magistrate, Ret.

s/ J. Michael Matthews
Arbitrator
J. Michael Matthews,
Esquire

APPENDIX H — DEFENDANT'S RESPONSE TO ARBITRATION INTERROGATORIES DATED JUNE 7, 1996

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No.: 96-227-CIV-ORL-22

JEAN BLAIN and YELVA BLAIN,
husband and wife,

Plaintiffs,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation,

Defendant.

DEFENDANT'S RESPONSE TO ARBITRATION INTERROGATORIES

Defendant, LIBERTY MUTUAL FIRE INSURANCE COMPANY, through its undersigned counsel, hereby files this response to standard arbitration interrogatories, and states as follows:

Defendant's Interrogatory #1: Describe in detail all laws, acts having the force and effect of law, codes, regulations and legal principles, standards, and customs or usages, which you contend are applicable to the instant action.

Response: Federal and Florida state laws, fire cause and origin standards and principles, electrical standards and principles; all other standards and principles of the proposed experts in this case, as well as all applicable laws of the State of Florida.

Defendant's Interrogatory #2: Furnish a detailed basis for the defenses you assert in your answer.

Response: Both fires were incendiary in origin. Evidence of irregular floor level burning was readily apparent, indicating the presence of a liquid accelerant. At least one of the Plaintiffs had the opportunity to set both fires. Both Plaintiffs had motive to set both of the fires. The residence was secured prior to the time of both fires. Only the Plaintiffs and their families possessed keys to the residence. There was no evidence of forced entry. No witnesses have identified any other individuals who had a motive to set the fires at or near the fire scenes during or shortly before the time of the fires. At least one of the Plaintiffs has misrepresented/ concealed their whereabouts at the time of both fires.

On March 15, 1995, Mrs. Blain stated that on the date of the first fire, she had gone into work to file paperwork for her assignments the previous day. However, Mrs. Blain had not completed any assignments on the previous day, or during the entire month of March prior to the first fire.

Also, Mrs. Blain stated she left work to shop at several stores. She said she returned a $89 watch to Costco and that she received a refund. Costco had no record of anyone returning a watch that day or even having Mrs. Blain as a member.

Mrs. Blain stated that on the day of the second fire, she went to see her friend, Vivi Dorsainvil, who runs a hair salon. Mrs. Blain stated that she spent several hours with Ms. Dorsainvil. However, Ms. Dorsainvil stated that visit was relatively brief, maybe lasting a few minutes.

On August 30, 1995, Mr. Blain stated that on the day of the second fire, Mrs. Blain had been at a buffet with the children and that the rest of the day she was at work. However, Mrs. Blain had previously stated that she visited Ms. Dorsainvil that day.

With regard to motive, Liberty Mutual asserts that there are several motives for the fires. Mr. and Mrs. Blain's financial condition was one factor. That is, their poor credit history, loan history, and current financial status provides motive for the fires.

In addition to the aforementioned financial motive, there was another motive. Mrs. Blain and her children lived in the insured premises in Kissimmee, while Mr. Blain lived in a South Florida apartment. Mr. and Mrs. Blain were becoming increasingly disgruntled with this situation. This provided motive for the fires.

Defendant's Interrogatory #3: State to the best of your knowledge whether all proper parties have been joined, or if you contend that some other person or legal entity is, in whole or in part, liable to the plaintiff or defendant in this matter, state their full name, address and telephone number and describe in detail the basis of the alleged liability.

Response: To the best of Liberty Mutual's knowledge, all proper parties to this case have been joined.

Respectfully submitted,

BUTLER, BURNETTE & PAPPAS

s/ Andrew J. Lewis
ANDREW J. LEWIS, ESQUIRE
Florida Bar No. 964190
Bayport Plaza – Suite 1100
6200 Courtney Campbell Causeway
Tampa, Florida 33607-1458
Telephone: 813/281-1900
Fax: 813/281-0900
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 7 day of June, 1996 to:

James C. Coleman
Rogers, Dowling, Fleming & Coleman, P.A.
34 East Pine Street
Post Office Box 3427
Orlando, Florida 32802-3427
Attorney for Plaintiffs

s/ Andrew J. Lewis
ANDREW J. LEWIS, ESQUIRE

APPENDIX I — TRANSCRIPT OF THE EVIDENTIARY HEARING OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION DATED JULY 24, 1996

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 96-227-CIV-ORL-22

JEAN BLAIN and YELVA BLAIN,
husband and wife,

Plaintiffs,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,
a foreign corporation,

Defendant.

HEARING BEFORE:	THE HONORABLE DAVID A. BAKER
TAKEN:	Pursuant to Notice Instance of Defendant
DATE:	July 24, 1996
TIME:	Commencing at 9:00 a.m.

Appendix 1

PLACE: George Young U.S. Courthouse
80 North Hughey Avenue
Courtroom # 6
Orlando, Florida

BEFORE: TRINA DODD
Stenographic Court Reporter
and Notary Public
State of Florida at Large

* * *

[3] *PROCEEDINGS*

THE CLERK: The case number is 96-227-CIV-ORL-22. Jean Blain, et al., versus Liberty Mutual Insurance Company.

Counsel, please state your appearances for the record.

MR. COLEMAN: Jim Coleman representing the plaintiffs.

MR. LEWIS: Drew Lewis representing the defendant.

MR. PAPPAS: John Pappas representing the defendant.

THE COURT: All right. I set this matter for hearing this morning in response to Judge Conway's order, which was as a result of the arbitration panel's report to The

Court indicating that the defendant had failed to present any material at the arbitration proceeding.

What I want to do is establish a factual record as to what occurred at the arbitration hearing in terms of the substance of anything that was presented procedurally and then hear arguments from counsel as to what further action should be taken by The Court.

Mr. Coleman, do you have anything to present?

[4] MR. COLEMAN: I don't have any documents, Judge. Would you like me to give a summary?

THE COURT: Well, you can make a proffer. We have also got some individuals here, at least one of the arbitrators who could perhaps testify and indicate what the basis for the report was.

MR. COLEMAN: Okay. If you just want me to give you a little summary first and then I will call him up to testify.

Just to give you a brief background about what the case is about, it's an insurance coverage claim. The Blain's house burned down and the defendant has denied coverage on the basis of arson defense. They are alleging that the fire was set intentionally and that the plaintiffs either set it or they were responsible for setting it.

Pursuant to The Court's order, we proceeded to arbitration and a week or two before the arbitration Mr.

Lewis sent me a letter asking if — I guess it was a telephone call — asking if I would agree to stipulate to waive arbitration. I wrote him back saying I would not. Mr. Lewis then wrote to the arbitration department here asking that the arbitration be waived, and it was not. We proceeded on to arbitration.

[5] At the arbitration proceeding, I put on our case. I think my case took approximately 50 minutes. I think I had approximately 10 to 14 exhibits and basically laid out everything I knew about the case at the time.

THE COURT: Did you present it through your own proffer basically?

MR. COLEMAN: Through a proffer, and both of the plaintiffs were there and both of the plaintiffs — I presented a proffer and then the arbitrators asked the plaintiffs some questions that they had. And I'd say our entire case, my proffer was about 50 minutes and then the questions were a little over an hour.

Mr. Lewis put on his case, which probably was about a ten-minute proffer, I'd say. He didn't give any specifics as to why they were denying coverage, just listed some general allegations, such as they were doing poor financially at the time that the fire occurred, they had a poor credit history, that type of thing.

When Mr. Lewis was done presenting his case, the arbitrators asked him questions such as, you indicated that they were in poor financial condition at the time of

the fire, what evidence do you have [6] of that. And Mr. Lewis indicated that he was not willing to go into that because that would violate his work product. And I think he used that answer to answer a couple of questions that the arbitrators had.

Mr. Lewis indicated, either in his opening or while he was being questioned, that he did not feel like anything he said would convince the arbitrators that the Blains intentionally set this fire, that he felt that the information he had was work product and that he was not going to disclose that, that he didn't think arbitration was appropriate; that if you lose arbitration, the only threat is you have to post the bond for the $300 for the arbitration fee, and basically to summarize, there's no bite to losing arbitration. And that's how the case went.

THE COURT: Was there a representative of the insurance company?

MR. COLEMAN: Yes, there was.

THE COURT: Did he or she participate at all?

MR. COLEMAN: No.

THE COURT: All right. Obviously, Mr. Lewis, I'll give you a chance to respond. Let's go ahead and get an evidentiary record.

MR. COLEMAN: All right. Would you like to [7] come up first, please?

Appendix I

WHEREUPON,

DONALD DEITRICH,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. COLEMAN:

Q. And would you please state your name, Judge?

A. I'm Donald Deitrich.

Q. And you were one of the arbitrators in this proceeding?

A. Yes.

Q. And would you give a summary of what took place at the arbitration proceeding, please.

A. Yes. Let me first clarify my status as I understand it. I have not been in contact with the chairman of the panel and therefore I do not regard myself as his designee for this purpose, consistent with your record.

I authorized my son to accept service of the witness subpoena on my behalf and I'm here in accordance with the process that was issued at the request of counsel for the defendant.

Appendix 1

The question again?

Q. Would you please summarize for The Court what took place at the arbitration proceedings, as far as the [8] evidence —

A. I would adopt your version of it, your statement of it. My personal view for joining in the report to The Court was that I considered that the defendant had failed to remove beyond the state court pleadings stages and was simply stating its position made of record by its answer in affirmative defenses. There is no acknowledgement of discovery having been undertaken, no fruits of discovery reported or disclosed, no evidence — no evidentiary support by proffer or otherwise of the allegations made.

The arbitrators attempted to learn what evidentiary support there was for certain of the allegations, such as the suggestion that the insureds, the plaintiff insureds, had motive by reason of their financial condition, and none was forthcoming. Again, this is at a stage, arbitration stage, several months after the insured, the insurance defendant, had removed the action from state court and was a proceeding in accordance with court order and rules of court for court-annexed arbitration.

My view in this regard is that a party can do what he wishes with respect to trial. In other words, if he wants to default, if that's his business judgment, he can let the trial proceed to default and take the [9] consequences. But when he's under an order to participate in arbitration, I consider that he has an obligation to do just that.

Appendix I

The position of the insured defendant was as if arbitration didn't matter in this case, that this was a case of black or white, liability or nonliability under the terms of the contract. I think when you take that position that it's black or white, that there is an obligation on your part to show some evidence that your position — that there's support for your position.

That's the only way in which you would induce the opposing party to ameliorate its demands for full compensation, for full recovery, seeing that you have something in opposition to its claim. But it was, as I say, as if arbitration did not matter in this case and counsel actually stated as such, is my recollection.

THE COURT: Anything else from the plaintiff?

MR. COLEMAN: No sir

THE COURT: You may Cross-Examine him.

MR. PAPPAS: Hello, Judge.

THE COURT: Good morning.

CROSS-EXAMINATION

BY MR. PAPPAS:

Q. John Pappas, how are you doing?

A. Good.

[10] Q. The report and recommendation of the panel states: "The defendant, however, failed to present any evidence upon which the panel could find for the defendant."

What evidence did you need?

A. Evidence in support of one or more of the affirmative defenses pled.

Q. Such as what? It's an arson case. What evidence would have been sufficient to present to you to vote that the Blains intentionally set fire to their property?

A. Some evidence in support of the affirmative defenses pled.

Q. Okay. So if I understand the panel's recommendation to The Court —

A. Again, I qualify my testimony as giving my reasonings. I don't speak for the panel.

MR. PAPPAS: I understand Mr. Markel (ph), who is in Wisconsin on vacation —

THE COURT: He's apparently available by telephone if somebody wants to hear from him.

MR. PAPPAS: Excellent, we might have to do that.

BY MR. PAPPAS:

Q. As with the arbitration, I proffer to this [11] Court, I think this hearing is unfortunate. But be that as it may, sir, I apologize for having to do this. I'm sure you'd prefer to be other places as well. But so I understand the recommendation from the panel to the federal court, it's not that any evidence upon which the panel could find for the defendant, it's not just a sufficiency of evidence; what you're saying is that we should be sanctioned because we did not provide any evidence, period?

A. I phrased it in my testimony as you, as a practical matter, did not participate in the arbitration panel proceeding.

Q. Well, I just want to understand what the standard is before Magistrate Baker here and what the recommendation is, and forgive me, I'm confused. I need to know and I think we all need to know, is it because no evidence was presented, we did not participate, or insufficient evidence was presented?

A. Well, my recollection is that no evidence satisfactory to myself was sufficient which would allow me other than — to find other than as I did, enjoining in the panel's recommendation.

Q. Okay. So regardless of what, and I don't mean to —

MR. PAPPAS: May I approach the witness, [12] Your Honor?

THE COURT: All right.

MR. PAPPAS: This is the order, and that's the statement there, the written recommendation. That's the order that Judge Conway, pursuant to — asked Magistrate Baker to have this evidentiary hearing.

BY MR. PAPPAS:

Q. So at least you, Your Honor, the reason why you recommended or agreed to recommend sanctions to the federal court is because insufficient evidence was presented to you to rule in favor of my client?

A. Well, my recollection is that no evidence was presented in support of the affirmative defenses.

Q. No evidence. You agree that proffer of counsel at arbitration would be evidence at an arbitration, correct?

A. It's to be considered some weight, given some weight.

Q. Well, need my client present live testimony to meet your standard at arbitration?

A. No, no.

Q. So it could be proffered by Mr. Lewis, correct?

A. But he made no more than a reiteration or a statement of the affirmative defenses, no reasons, no explanations.

[13] Q. Did he tell you that it was arson?

A. Well, I guess if you consider — I can only consider that a proffer.

Q. Excuse me?

A. I consider it a restatement of the pleadings, not a proffer. The case was not advanced beyond the pleadings stage as far as I was concerned.

Q. Did he read the answers to interrogatories, sir, in which he said that both fires were incendiary in origin? "Evidence of a regular floor-level burning was readily apparent indicating the presence of liquid accelerants. At least one of the plaintiffs had an opportunity to set both fires. Both plaintiffs had motive to set both fires. The residence was secured prior to the time of both fires."

That was all read to you, was it not?

A. Whether or not it was read or not, I acknowledge it was part of the record; but there was nothing in support of the statements.

Q. Like what, like live testimony?

A. A scientific report of an independent investigator would have sufficed I would think, something beyond mere allegation.

Q. No mere proffer?

A. Well, the incident had not been proffered.

[14] Q. So at least with regard to you, one of the three panelists, your problem was, if I may, is you wanted the cause and origin expert to take the stand and to give testimony?

A. No. That would have sufficed, of course, but there were — I wanted more done than what was done.

Q. And so it's a matter of degree now?

A. Well, it's a matter of meeting the minimum standards for meaningful participation in an arbitration proceeding some months after removal of the cause.

Q. Don't the federal court annex arbitration rules encourage that the evidence be proffered by officers of The Court in some summary fashion?

A. The panel left it to the counsel for the parties to present the cases that they wished and it allowed for it —

Q. And did Mr. Lewis do that?

A. Well, he did what he did.

Q. And that which I just quoted to you, you would agree was at least part of the proffer?

A. If it wasn't read, it was referred to; and it was part of the record I would say.

Q. In addition, he said the residents — excuse me, there was no evidence of forced entry?

A. But again, on examination, with respect to [15] those answers to court interrogatories, there was no explanation in amplification, or support, or justification for what was stated or claimed.

Q. So let me see if I understand — and I'm going to get done very quickly with you, sir, because this has already gone way too far — but you're saying that after the proffer by counsel at a federal court annex arbitration, if a member of the panel wants to see the, quote, unquote, evidence in support of it, that counsel needs to be prepared at federal court annex arbitration to provide that testimony and that documentation in support of that proffer?

A. The panel has a right to consider, in addition, something beyond a bald assertion in support of an allegation, which is a mere statement of an allegation of a pleading.

Q. So for — hypothetically, in the future, if you're a member of the panel and if this standard is appropriate, in order to protect against any possible sanctions, counsel should be sure to have the most material witness subpoenaed for that annex arbitration in case you have a question about the proffered fact, so that witness could give testimony, correct?

THE COURT: That's not what the witness testified to.

[16] MR. PAPPAS: Well —

THE COURT: That's not even close to what the witness testified to. It's argumentative.

Appendix I

BY MR. PAPPAS:

Q. Okay. Well, then let me ask you this, Judge: If the attorney says, when you request the proffer, and thus the credibility, and honesty, and straightforwardness of that officer of The Court as to whether or not he has any evidence in support of that factual statement, and that attorney says I don't have that piece of evidence with me at this federal court annex arbitration, is that sanctioned?

A. Well, if there's no explanation as to why he doesn't.

Q. It's back in the office.

A. Well, that would be a dereliction on his part, I would say —

Q. So all —

A. — if that's an important piece of evidence. If that's an important aspect of the hearing that he ought to have been prepared to support, other than making mere conclusions, which are amounted to a restatement of the pleadings, the affirmative defenses of the pleadings.

Q. The pleadings, the affirmative defense, if I may paraphrase as an officer of The Court here, and [17] hopefully we have enough evidence to back us up, is affirmative defense. And I'll hand it to you, these are the affirmative defenses. All it says is that Mr. and Mrs. Blain burned it or had it burned or they intentionally concealed and misrepresented material fact.

A. And that's essentially the position that we were left with by counsel following the arbitration, concluding at the arbitration.

Q. That which I quoted about a key job, the property was secured, and the life, is that anywhere in the pleadings?

A. No.

Q. Okay. So that's additional, that's beyond the pleadings, isn't it, sir?

A. Again, no evidentiary support for it.

Q. There was proffer, but no testimony and no documents submitted, correct?

A. When the proffer consists of the poor financial condition of a party to litigation, more is required had he made that charge than just the statement itself; and nothing was forthcoming in that regard. That was one point of inquiry that's clear in my mind.

Q. The federal court arbitration annex rules requires —

A. I'll just give that as an example.

[18] Q. Well, I know. I was talking about the cause and origin of the fire, which you said nothing beyond the pleadings. We'll get to the motivation if —

A. Nothing regarding causation; again, absolutely nothing other than a statement similar to the pleading or a restatement of the pleading that there was this cause.

Q. There was no evidence of forced entry. That was proffered, that's not in the pleadings, correct, sir?

A. You can go down one by one if you want and I'll acknowledge that's true, but it doesn't amount to anything.

Q. So that's a quick way of handling it. Whatever Mr. Lewis proffered at the federal court annex arbitration doesn't amount to going beyond —

A. He didn't even say he had a witness that would testify to that effect. He didn't say that he had an investigative report which says that there was this type of condition found on the premises.

Q. So all he had to say was there's cause and origin experts that will testify to those facts and there are officers that will testify to those facts, and that would have been sufficient?

A. It might have been sufficient without requiring the reports themselves.

As I recall, there was no acknowledgement that [19] any discovery had been undertaken since the beginning of this case and that was part of his explanation for his not being in a position to say more. That they just didn't know at this point, at this stage, notwithstanding the time that had passed, any more than they knew when they pled to the case

Q. Once it was removed, how soon should the depositions have been conducted?

A. Well, the arbitration rules contemplate, and the clerk of court is here in support thereof, probably that there be adequate discovery in preparation for the arbitration hearing. And apparently there was none on the part of the insurance company defendant.

Q. What deposition — are you suggesting that the recommendation for sanctions is sanctioning my client because they didn't conduct discovery?

A. I would say that if you are going to make proffer that a claimant, plaintiff/claimant, on a fire policy had a motive to burn his home because of his financial condition, that you ought to have some evidence in support of what his financial condition is; and there was none.

Q. And that evidence —

A. And that could have been obtained.

THE COURT: Let me interrupt you and give you a [20] tip.

MR. PAPPAS: Yes, sir.

THE COURT: What I understand to be the issues here is that your client, through your colleague, basically took a cavalier attitude towards this arbitration; that is the basis for the recommendation that was made. And

disregarding the purposes behind the arbitration program and the spirit behind the arbitration program, didn't want any part of being in the arbitration program, showed up, and did nothing more than go through the motions.

MR. PAPPAS: All right. May I respond to that under oath?

THE COURT: Well, I'm telling you, that's what I think the issue is. I'm not sure your questioning is going to do anything that avoids that issue, which is what the final case has been put out here.

And what Arbitrator Dietrich was elucidating in his Direct testimony was that the proffer wasn't even a proffer; it was simply a recitation of what the issues were in the case without a recitation of what — you don't even need to — you can present exhibits or not present exhibits, you can present testimony or not present testimony, but you have got [21] to describe what the evidence is, you have got to enjoin issues, you have got to get beyond pleadings so this arbitration is meaningful.

MR. PAPPAS: Yes, sir.

THE COURT: And the indication from the witness is that that did not occur.

MR. PAPPAS: Now, may I respond to that?

THE COURT: Well, if you want to ask anymore questions, the witness will answer as to your examination and I'll let you argue the issues on the —

MR. PAPPAS: Well, I want to speed this up. Here's answers to interrogatories, not pleadings, that I wish to mark —

THE COURT: Do you have any more questions for the witness?

BY MR. PAPPAS:

Q. Sir, these answers to interrogatories, Defendant's Response to Arbitration Interrogatories, they were read into the record as part of the proffer by Mr. Lewis, correct?

A. I don't recall their reading, but I recall their being part of the record when we had the proceedings.

Q. Okay. And you would agree that much of that [22] information goes well beyond the mere bare allegations of the pleadings and the affirmative defenses?

A. They are additional statements without evidentiary support, yes.

Q. And when you say without evidentiary support, again, notwithstanding what Magistrate Baker just said, you are referring to testimony and documents?

A. Well, proffers as to what testimony and documents would say —

Q. Yes, sir.

A. — or show.

MR. PAPPAS: May we mark this as Exhibit No. 1?

THE COURT: It's in the record already.

MR. PAPPAS: Excellent. Thank you, Your Honor, for your efficiency.

BY MR. PAPPAS:

Q. Do you have any idea, Judge, what evidence would have been sufficient for you to rule in favor of Liberty Mutual and find that you, at least as one of the panelists, would find that the Blains actually, intentionally committed this arson?

A. Well, substantial evidence that an arson had been committed and committed by them, or either of them, or procured by them.

Q. Substantial evidence. Would circumstances —

[23] A. The same quantity of evidence that we found in the record in support of the claimant's claim on the basis of which we made the arbitration award.

Q. Did you find Mr. Lewis's presence and demeanor at the arbitration, in any way, unprofessional?

A. No.

Q. Was he rude or discourteous in any way to the panel?

A. No.

MR. PAPPAS: I have no further questions at this time of this witness, Your Honor.

THE COURT: Redirect?

MR. COLEMAN: No, sir.

THE COURT: Thank you, sir.

MR. PAPPAS: Judge, may I, under oath, if necessary, do my proffer to speed up this process, especially given what The Court has indicated it believes is the issue, so we don't have to bring Mr. Matthews on the stand and go through all of this if it's unnecessary?

THE COURT: Well, you can present whatever you want.

MR. PAPPAS: Excellent.

I swear to tell the truth and nothing but the truth so help me God.

[24] Is that sufficient, Your Honor?

THE COURT: Depends on what you are trying to do.

MR. PAPPAS: Put me under oath.

THE COURT: Can you swear him in?

Appendix 1

WHEREUPON,

JOHN J. PAPPAS,

having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

MR. PAPPAS: If I may, in narrative form, with no objection?

THE COURT: Yes, sir.

MR. PAPPAS: Mr. Lewis has no responsibility for this; I have all the responsibility. Mr. Lewis did exactly what I told him to do at this arbitration. We tried to get out of this arbitration because as we've indicated to the clerk of the court and to this court, that there was no benefit to our client in going before this; it would be an unnecessary waste and expense. It would be an unnecessary waste and expense upon this court's resources as well.

We tried to get out of it and opposing counsel objected to it. Opposing counsel, it's my understanding — and he can correct me if I'm wrong — said he wanted to see what our case was all [25] about before discovery and that's why he wanted to go through the arbitration. For $300 it was of no benefit to my side to go there and to lose because they would be filing a $300 trial De novo.

Moreover, it's a circumstantial fire arson fraud case. There was no way, we thought, without having a

full-blown trial and Cross-Examination of Mr. and Mrs. Blain so the good panel could see their credibility or lack thereof under Cross-Examination, would rule in our favor. And then even if they did rule in our favor, once again for $300, they would go forward and they would proceed.

Number two, it is my understanding, and I don't think the good judge really said otherwise, that there was a proffer of information beyond the pleadings. We answered interrogatories, we gave information to this court and the other side about the method of the fire, about it being possibly what is called a key job, we talked about her misrepresentations about where she was at the time of the fire. All this goes beyond the mere pleadings.

Nevertheless, we do not believe, and I do not believe, that the federal court annex arbitration program, which is a good program for certain [26] cases — and we did participate in this, and we did participate politely, professionally, and in good faith. We came from Tampa, we had our client here, and we were here. And we stayed until the panel dismissed us, but —

THE COURT: When did you file your Motion to Dismiss the Arbitration? I didn't see that in the file.

MR. PAPPAS: When was that, Mr. Lewis?

MR. LEWIS: Unfortunately, instead of filing a motion to that effect, I inadvertently wrote to the arbitration panel to that effect.

MR. PAPPAS: When was that?

MR. LEWIS: I'd have to look. It was several weeks before the arbitration hearing.

THE COURT: You understand the local rules require that relief from The Court be made by a motion to The Court?

MR. PAPPAS: And that is our error. That is our procedural error for failing to get out of the federal court arbitration. And I apologize on behalf of my firm and my client for failing to do that. Having said that — and I apologize for the unnecessary court time. We did try to get out of it. We did not comply with the federal court rules. [27] The $300 pays for —

THE COURT: Did you discuss that issue at the case management conference that you had with opposing counsel?

MR. PAPPAS: Mr. Lewis?

MR. LEWIS: Whether or not arbitration was —

THE COURT: Appropriate.

MR. LEWIS: Not at the case management conference. But after the case management conference, I telephoned and I contacted Mr. Coleman several times and I received a letter back stating that he was not going to stipulate to the cancelling of arbitration at this time. And that was a couple of weeks also, back.

THE COURT: One of the many purposes of the case management meeting is so that you come to either a meeting of the minds or a disagreement on issues such as that. And if you disagree, you note that and you ask for a preliminary pretrial conference or you file a motion.

MR. PAPPAS: We failed to file a motion. Mr. Coleman knew our position before the arbitration about what we were going to do at the arbitration, that we thought it was going to be ineffective. We even volunteered and suggested to Mr. Coleman and to [28] the clerk, although I admit we failed to comply with the requirements of The Court in filing a formal motion, we even suggested an earlier mediation.

That that would be much more productive than a federal court annex arbitration, nonbinding arbitration. In this particular case he said no, he would rather do the federal annex court arbitration. We — I will answer any question this court has.

THE COURT: I can't tell you how many dozen of cases I have taken out of arbitration and put into mediation because at a preliminary pretrial conference either there was an agreement or at least just one side thought that arbitration was inappropriate. I agree with you. I think that arbitration is not perfect for lots of cases. I can debate whether arson cases are good for this or are not good for this.

MR. LEWIS: If I may, Your Honor, just going back to the case management conference. Looking at the

executed report that we did, I recall that I mentioned to them the fact that we didn't — before I went over — came over here for the case management conference, Mr. Pappas informed me of basically what you're talking about now.

I mentioned that to them and they felt [29] otherwise, which is the reason we were likely to disagree in the future, as opposed to where it says parties agree to participate in the court annex — actually I take that back. That was the courthouse mediation. If we look on page 7 of the Case Management Report, which is signed by both parties, it says: "Parties agree to consent to binding arbitration, pursuant to Rule 802."

THE COURT: That's for binding arbitration.

MR. LEWIS: You said court annex mediation, and you said likely to agree in the future. I didn't want to not go to the arbitration for the exact reason that —

THE COURT: But you know under the local rules, which cases fall under arbitration, you can get the arbitration notice if you want to get out, but you've got to file a motion; but it's really easy to do.

MR. LEWIS: I really wish I had done that in this case; I apologize. I think Mr. Pappas is being very courteous in saying it was his fault. It's basically mine.

THE COURT: Mr. Pappas, you indicated you thought the arbitration was going to be an idle process

because without Cross-Examination of the [30] plaintiffs, that you couldn't win.

Did you take the plaintiff's depositions prior to the arbitration?

MR. PAPPAS: No. They take — we took Examinations Under Oath, or the client did, so we had those statements.

THE COURT: That's the other thing that bothers me about your response here: That you didn't have enough time for discovery and yet your client obviously had time to do an appropriate investigation to come to a conclusion and deny the claim.

MR. PAPPAS: Your Honor, we present — so there's no misunderstanding, if we wanted to have a full-blown, one-day mini trial, we could have done it. And, in fact, if I would have been present and if I thought Mr. Coleman would have allowed, under those circumstances, his clients to be put under Cross-Examination, I would have made sure we had a court reporter present. Because without a court reporter, it's just a free shack to have Mr. and Mrs. Blain —

THE COURT: You already had sworn statements from him.

MR. PAPPAS: Yeah, but the point is that we are [31] trying to win a case now. I mean, what — my zealous representation of my client comes ahead of this process. I have a duty —

THE COURT: No, sir, it does not.

MR. PAPPAS: It doesn't. So if the federal court annex —

THE COURT: Your duties to The Court are correlative with your duties to your client.

MR. PAPPAS: So if there is perceived by me as an attorney, attorney-client work product, that there's something in a federal court annex arbitration program that has no benefit to my client but a detriment, that I am obligated —

THE COURT: The rules of discovery have detriment for you and you have to respond to discovery.

MR. PAPPAS: We sure do, yes, sir.

THE COURT: And you have to respond to this program.

MR. PAPPAS: And we did.

THE COURT: You went through the motions.

MR. PAPPAS: Judge, let me ask you this with all due respect: I go and we try the mini case that everyone here apparently envisions if we didn't get out of, we should have tried. We put him on the [32] stand, I conduct my Cross, and respectfully the panel is convinced they burned it, what have I done to benefit my client?

THE COURT: You have done what the rules require.

MR. PAPPAS: The rules require that presentation?

THE COURT: They don't require the specifics. You are being argumentative again, Mr. Pappas. You are not advancing your position.

MR. PAPPAS: What question — with all due respect to this Court, what specific question can I be responsive to to advance our position before you, Magistrate Baker, everyday? I want to be responsive to that.

THE COURT: I'm trying to find out what you thought the arbitration was going to accomplish, and I think I've heard.

MR. PAPPAS: The answer is: I thought it was going to accomplish nothing productive.

THE COURT: That's why you took the approach that you did; and frankly, it's not satisfactory.

MR. PAPPAS: But I need to know as an officer of The Court, for future behavior before this Court, what will —

[33] THE COURT: You show up for these arbitrations —

MR. PAPPAS: Excuse me?

THE COURT: You show up for these arbitrations as you did. You show up and you have your proffer. You can do it by proffers, nothing wrong with proffer.

MR. PAPPAS: Yes, okay.

THE COURT: But when a panelist says, you claim they were in financial distress, what do you have to show for that? And my understanding is you said they were in financial distress and we're relying on that to establish arson.

MR. PAPPAS: So I understand —

THE COURT: Is the incendiary origin an issue in this case?

MR. PAPPAS: Yes.

THE COURT: That's in dispute?

MR. PAPPAS: Yes.

THE COURT: And I just tried an arson case and the lawyer spent two-thirds of the — the insurance company's lawyer spent two-thirds of the time trying to prove that it was incendiary in origin, which was stipulated to.

MR. PAPPAS: Yes. Well, there's usually a [34] reason for that, because you want the jury, who doesn't know about arson, to understand more than the bulk

conclusion that it's arson, why the carrier believes it's arson. It does have a persuasive effect before most jurors. I can understand strategically why that attorney did that.

But having said that, we are here for sanctions to be imposed. I take full responsibility for this. If I did something wrong, I need to know what not to do wrong in the future. I've never been sanctioned before in the 14 years I've practiced law. I want to know, sir, next time, what more should we have done? What is the degree that we have nailed?

I think, with all due respect, that if this court is about to invoke sanctions against me, that I be provided with the degree that I failed. What evidence did I fail to present with Mr. Lewis in the proffer that would have avoided sanctions?

THE COURT: You honestly believed that you prepared for that hearing in good faith?

MR. PAPPAS: Absolutely, Your Honor, absolutely.

THE COURT: That's not what the evidence shows.

Anything else you want to present?

MR. PAPPAS: Well, there's a history of [35] discovery in this case, Your Honor. I could ask Mr. Lewis to quickly proffer it as an example. Pursuant to court rules we were not allowed to take a deposition. We were served interrogatories until they met with counsel. So

we could not, right away, as is my — and I say under oath — is my standard.

With the pleading, with the answer to serve interrogatories for request for production immediately to speed up the process, we had to wait until a meeting of counsel. And then there was a misunderstanding because then I would proffer it again to speed up this process in this evidentiary hearing; but there was a misunderstanding and we have a motion out on it. We thought Mr. Coleman was going to voluntarily disclose information, as we did to them, pursuant to The Court's rule — Rule 26 of the new rules of voluntary disclosure — and we did that.

Normally, with regard — you asked the question about Cross-Examination of the plaintiff — normally is a strategic decision. We wait to depose the insureds in cases like this till after all discovery is done so we have the benefit of the subpoena power and we do have all the financial records — it makes sense strategically — so we don't take their [36] depositions the first month of discovery. And it would never be ready for an early federal court annex arbitration, the deposition.

And we don't want to do, with all due respect to The Court, very quickly, a detailed Cross-Examination of people like Mr. and Mrs. Blain because then they go back and they figure out where they made a mistake in their testimony and they change it. If our theory of the case is right, we believe they don't tell the truth and they are not afraid of committing perjury.

And again, that's not in the interest of my client down the road. So there's a balancing act between my obligations of this court as an officer of The Court, which I take very seriously, and my obligations to my client to make sure that they are zealously represented.

I can tell this Court in good faith that I am the person responsible for this total — not my client and not Mr. Lewis, I am the person responsible for this. If I failed in that balancing act to do it the right way, I apologize. But I would like for some direction in the future as to — if we are not going to have mini trial requirements, and proffers, simple proffers are not enough, then [37] what is enough to avoid the wrath of this Court, which I do not and never want, never want to incur. And I certainly don't want to offend arbitrators who have better things to do with their time than to volunteer for this process.

Having said all of that, if there are any questions this Court has of me, I will gladly, under oath, answer them to the best of my ability.

THE COURT: Anything else?

MR. PAPPAS: Mr. Lewis, do you think we have anything else to present?

MR. LEWIS: Aside from the fact that, as Mr. Pappas indicated, we were awaiting the pre-court disclosure required by Federal Rule 26 from opposing counsel, after the extended date, which I granted them, came and past, I wrote them and asked them where it was and granted

them another ten days in addition to that pre-court disclosure. I did not receive a response from that until the day before the arbitration hearing, so I did not have any — to date, still have not received any disclosure from them as to the witnesses they feel are relevant to this case or the documents that they feel are relevant to this case. That's basically it.

MR. PAPPAS: And under the circumstances and [38] given that proffer, we feel no need to have Mr. Markel give testimony over the phone, or Mr. Matthews, or anyone else. We apologize for the inconvenience — or Mr. Coleman, by the way.

MR. COLEMAN: Judge, could I just address a couple of the points, Your Honor, briefly?

THE COURT: All right.

MR. COLEMAN: Judge, in regards to their inability to do any discovery, this is a case that before we were even retained in the case, before Liberty Mutual denied coverage, the Blains gave Liberty Mutual written authorizations to obtain all employment records, financial records, school records on their children, which Liberty Mutual did. A Liberty Mutual adjuster took a statement of both Mr. and Mrs. Blain that was about 50 pages each. Then after that, Mike Miller, an attorney here in town, took a sworn statement of Mr. and Mrs. Blain that was about 50 pages each. So they already have two statements of Mrs. Blain, two statements of Mr. Blain, and they utilized those authorizations.

They obtained the employment records. They obtained school records regarding the children. So there was a lot of investigation that was done even before suit was filed in this case. And none of [39] that was presented at the arbitration hearing.

And my last point, Judge, is I think Mr. Pappas is missing the entire point of arbitration, nonbinding arbitration, and that is I think it's a settlement tool. Both sides get to hear restraints and weaknesses of their case. You get an independent neutral arbitration panel to rule on the evidence. And after the nonbinding arbitration, you can go back and reevaluate your case and hopefully that will encourage settlement.

Mr. Pappas and Mr. Lewis are taking the position that if it doesn't benefit my client, then it's not worth going through; and I don't think that that's the whole purpose of the arbitration.

THE COURT: All right. I'll take the matter under advisement and prepare a recommendation for Judge Conway's office.

MR. COLEMAN: Thank you, Your Honor.

MR. PAPPAS: Thank you.

This court is in recess.

THE CLERK: All rise.

(Whereupon, the proceedings concluded at 9:50 a.m.)

* * * *